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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 715

H. J. BLACKFORD, ET AL.,
Petitioners,

vs.

LEGH R. POWELL, JR., ET AL.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUPREME COURT OF THE UNITED STATES

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of H. J. Blackford, W. V. A. Waterman, W. H. B. Simpson and Ed C. Wright,, respectfully shows unto this Honorable Court:

A

Summary Statement of the Matter Involved

The purpose of this petition is to have this Court review a decision (337) of the United States Circuit Court of Appeals for the Fourth Circuit, sustaining and affirming an order (4) of the District Court for the Eastern District of

Virginia, denying and dismissing the petition of H. J. Blackford seeking the payment of interest declared due and payable and a payment on account of principal due and unpaid of the Seaboard Air Line Railway Adjustment Mortgage 5% Gold Bonds, outstanding in the hands of the public (3).

Your petitioners are creditors of the Seaboard Air Line Railway Company now in Receivership instituted December 23rd, 1930, upon a creditors bill. The claims of the petitioners are evidenced by their respective holdings (1, 10, 16) of Adjustment Mortgage bonds of the Seaboard Air Line Railway Company issued under a mortgage indenture dated October 1, 1909, to secure the payment of the principal and interest of said bonds (6).

At the time of the appointment of the Receivers of the Railway Company funds amounting to $20,050.00 (2) were in the hands of paying agents for the payment of coupons #61 and #62 of the Adjustment bonds, dated August 1, 1925 representing the interest which had been declared due and payable but which said funds were paid over by the paying agents to the Receivers.

By decree of the District Court of December 10, 1943, the Plan of Reorganization, as modified, was affirmed (119). On appeal to the Circuit Court of Appeals for the Fourth Circuit that Court affirmed, under date of August 2, 1944, the lower court in *Badenhausen, et al.* v. *Guaranty Trust Co. et al.*, 145 Fed. (2) 40; (Cert. denied 323 U. S. 697). The Adjustment bonds were not parties to the appeal (191).

The Adjustment bonds were not represented at any time by the Trustee under the mortgage, nor by a committee of bondholders during the reorganization proceedings although there had been a committee in the early days of the receivership which committee ceased to function after 1935 (17).

There were ten underlying mortgage bonds on different parts of the Seaboard System and four general issue mortgages known as the First 4s, the Refunding 4s, the Adjustment 5s and the First and Consolidated 6s (6). These general mortgages rank in the order named, the first three cover just about all that the Seaboard possessed in the way of railroad property of approximately 4000 miles of the System. The Adjustment mortgage of the same date, October 1, 1909, as the Refunding was subordinate to the Refunding and covered the same property as the Refunding as well as all after-acquired property of the Seaboard. The First and Consolidated Mortgage, dated September 1, 1915 (25), purported to give a first mortgage lien on 408.96 miles of railroad (East Carolina Lines) which came into the Seaboard System under a merger dated October 11, 1915 (7). There were $65,915,000.00 of Refunding bonds deposited under this mortgage (23).

The Seaboard reorganization being in an Equity Court, was referred to a Special Master (134) who in his findings and conclusions denied to the Adjustment bonds any right to participate in the assets of the Seaboard on the theory that the Refunding bonds, being a superior lien, were not satisfied in full, and consequently under the rule of full or absolute payment for prior liens, as established by the decisions of this Court, the Adjustment bonds were not entitled to share in any way in the assets of the Seaboard (248, 251). The District Court followed this same line of reasoning and the Circuit Court of Appeals affirmed on appeal.

The complaint of the Adjustment bondholders is directed at the application, or, rather the misapplication, of this rule or principle of law as established by this Court and which grew out of the decision in the case of *Northern Pacific RR.* v. *Boyd* and came to be made absolute by later decisions in

cases involving the reorganization of railroads, principally, as well as other corporations.

It is the action of the United States Circuit Court of Appeals for the Fourth Circuit in its judgment of October 11, 1945 (337), affirming the United States District Court for the Eastern District of Virginia whose order or decree of April 27, 1945, (4) denying and dismissing the petition of H. J. Blackford for payment of certain interest declared due on Adjustment bonds and payment on account of principal of Seaboard Air Line Railway Adjustment Mortgage 5% Gold bonds, outstanding in the hands of the public, to the holders thereof upon presentation and surrender thereof, such amount per $1000 bond as the Court may find and deem proper, which your petitioners now ask this Court to review.

Reasons Assigned in Support of Petition

First. The petitioners should have their writ because a rule or principle of law growing out of and established by the decisions of this Honorable Court is invoked and sought to be applied in a manner so as to destroy the property rights of the Adjustment bondholders of the Seaboard Air Line Railway. And, this to the profit of a class of bondholders who have managed, controlled and dominated the reorganization of the Railroad since the inception of this consent receivership in a Court of Equity.

Second. Because in the application of a principle or rule of law as established by the decisions of this Honorable Court, that rule or principle of law has been twisted and misapplied so as to do an injustice to these petitioners and other holders of Adjustment bonds. In that the Adjustment bondholders' lien under their mortgage indenture was

prior in time and prior in right to the lien, if any, of the First and Consolidated 6s and, yet the latter took to the exclusion of the petitioners and other adjustment bondholders.

Third. The Trustee of the Refunding bonds raised in the receivership proceedings a question (21) as to the validity of the lien, if any, of the First and Consolidated mortgage, but the latter mortgage held $65,000,000.00 (23) of the Refunding bonds as collateral and the question was not litigated to a final conclusion but the First and Consolidated mortgage effected a compromise settlement (41) whereby the Refundings took a certain percentage and the First and Consolidated mortgage the balance of the assets involved. This compromise settlement was made by, *not* the Trustees of these two bond issues, (40) but by the respective committees for the two bonds and the allocation of securities of the new Seaboard followed the compromise settlement. And, because of this arrangement, the Refunding bonds took not pursuant to the rule of absolute priority, as established by the decisions of this Court, but under a compromise agreement (22) recognized and permitted under the decision of this Court in *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106.

Fourth. The decision of the Court below is one of grave importance to not only the petitioners, and all other holders of Adjustment bonds of the Seaboard, there being $2,500,000 of the issue in the hands of the public (14), but to the great number of bondholders of other corporate securities throughout the country and especially to those holders of railroad securities now in reorganization proceedings.

Fifth. The decision of the Court below, in refusing to give consideration to the cash funds arising from the large earn-

ings of the Railroad over the years 1940 to 1946, as a source out of which payment to a secured creditor can be made, is in direct conflict with the decision in the Tenth Circuit in the reorganization of the Denver and Rio Grande Western Railroad, holding that such funds (cash and current assets) while not required to be reflected in the capital structure, in the form of capitalized value, does not remove them from the picture and they must be taken into account in drawing up a fair and equitable plan of reorganization, and must be distributed in a manner that is fair and equitable to all classes of creditors. *In re Denver and Rio Grande Western RR.*, 150 Fed. 2nd, page 28, Advance Sheets, September 3, 1945.

Jurisdiction

This petition is submitted and review of the lower Court decision prayed pursuant to authority of Title 28 U. S. C. A. par. ~~237~~ 347 (a). (Judicial Code, Section ~~230~~ 240 amended.)

WHEREFORE, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fourth Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain, to be therein named, a full and complete transcript of the record and all proceedings in said case entitled H. J. Blackford, et al., Appellants, *vs.* Legh R. Powell, Jr., et al., Appellees, in the cause of Guaranty Trust Company of New York, et al. *vs.* Seaboard Air Line Railway Company, Consolidated cause, and that the said decision of the Circuit Court of Appeals for the Fourth Circuit and every part thereof may be reviewed by this Honorable Court, and that said judgment may be reversed by this Honorable

Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioners will ever pray.

H. J. Blackford,
W. V. A. Waterman,
W. H. B. Simpson,
Ed. C. Wright,
Petitioners,

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Dated January 4, 1946.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 715

H. J. BLACKFORD, ET AL.,

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Respondents

BRIEF FOR PETITIONERS

The petitioners seek a review of the judgment of the Circuit Court of Appeals for the Fourth Circuit affirming October 11, 1945, an order of the District Court for the Eastern District of Virginia, dated April 27, 1945, which denied and dismissed the petition of H. J. Blackford for payment of interest, and on account of principal of Seaboard Air Line Railway Adjustment Mortgage 5% Gold Bonds, outstanding in the hands of the public.

The order of the District Court of April 27, 1945 is to be found on page 4 of the printed record, there was no opinion officially reported. The per curiam opinion of the Circuit Court of Appeals is not officially reported as yet, but will be found on page 337 *et seq.* of the printed record.

Grounds on Which Jurisdiction of the Court Is Invoked

The writ of certiorari is sought pursuant to authority of paragraph 347 (a) Title 28, U. S. C. A. (Judicial Code, Section 240, amended).

The grounds are two in number:

(a) That a rule or principle of law growing out of and established by the decisions of this Court, *i. e.* the rule of full and absolute priority for prior claims as first found in this Court's opinion in the case of *Northern Pacific RR. Co.* v. *Boyd*, 228 U. S. 481, 57 L. Ed. 931, and subsequenty approved and made absolute, rather than relative, in *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 530, 85 L. Ed. 996, 61 S. Ct. 675. "That is to say, senior claims first receive securities of a worth sufficient to cover their face and interest before junior claims receive anything", as expressed in the late case of *Ecker* v. *Western Pacific RR. Corp.*, 318 U. S. 448, 87 L. Ed. 892; and further affirmed in *Institutional Investors* v. *Chicago, M., St. P. and Pacific RR. Co.*, 318 U. S. 523, 87 L. Ed. 960, was invoked to deny to the Adjustment Mortgage 5% Gold Bonds of the Seaboard Air Line Railway the right to participate in any way in the distribution of the assets of the Railway Company in receivership or the securities of the new company formed to take over and succeed to the property of the old Railway Company (248, class 19, pages 250 and 251; also 5 sub par. (b) of Order and Decree of April 27, 1945).

In the application of this rule or principle of law established by the decisions of this Court, the District Court caused an injustice to be done the Adjustment Bondholders through the misapplication of this Court's rule or principle of law by failing to recognize that the prior claim of the Refunding Bonds over the Adjustment bonds and also over the lien, if any, of the First and Consolidated Sixes was not satisfied in accordance with the rule as to its prior claim

but, the prior claim of the Refunding bonds was *compromised* (41) by an agreement with the junior claim of the First and Consolidated 6% bonds and thereby the Refunding bonds prior claim took in accordance with the *compromise agreement* and not in accordance with the rule or principle of law as established by this Court of full or absolute payment to the prior lien or claim of the Refunding bonds over the claim or lien, if any, of the First and Consolidated bonds (20, 23, 37, 40 and 41).

A further wrong was perpetrated upon the Adjustment bonds by reason of the compromise agreement between the Refunding bondholders committee and the committee for the First and Consolidated bonds in that the Adjustment Mortgage Indenture gave a lien to the Adjustment bonds, which, while subordinate to the lien of the Refunding bonds, was prior in time and prior in right to the lien, if any, of the First and Consolidated 6% bonds, yet the prior lien of the Refunding and the junior lien, if any, of the First and Consolidated Sixes undertook, through the committees for these two bonds, to settle by *compromise* agreement the conflicting claims without any consideration whatsoever of the claim of the Adjustment bonds whose lien was senior to the lien, if any, of the First and Consolidated 6% bonds (32 and 36) (6 Adjustment Mortgage Indenture covered same property of Seaboard as Refunding mortgage and was dated October 1, 1909, page 294).

That the application of the full or absolute priority rule or principle of law, as established by the decisions of this Court, is a matter of much concern and grave importance to these petitioners and to holders of securities of other railroads now in reorganization must be apparent and of particular interest to this Court in a consent receivership in a Court of Equity. The misapplication of that rule or principle of law is of even more concern to this Court.

(b) These petitioners for the writ of certiorari, in the petition of Blackford filed in the District Court, sought to show that the large earnings of the Seaboard Railway from its operation by the Receivers during the years 1943 and 1944 (3) (although the years 1941, 1942 and 1945 greatly increased these net earnings) are subject to the lien of the Adjustment mortgage and provide a means by which the Adjustment bonds, outstanding in the hands of the public, could be awarded proper recognition by the District Court. But, the lower Court denied any relief to the petitioners below and the Circuit Court of Appeals affirmed in holding there were no funds (341) in the receivers hands subject to the lien of the Adjustment mortgage out of which the payments prayed for could be paid. The Circuit Court of Appeals for the Fourth Circuit thus denied to the Adjustment bondholders the right to share in the assets of the Seaboard Railway arising out of the large net earnings for the War years which are a reality and not the mere forecast of some expert witness, produced by a bondholders group interested in the outcome of their own bond issue in the allocation of securities of the reorganized railroad.

This holding of the Circuit Court of Appeals for the Fourth Circuit cannot be reconciled with the position taken by the Circuit Court of Appeals for the Tenth Circuit and a direct conflict results, for the Tenth Circuit Court of Appeals expressly pointed out in its opinion in the case of the reorganization under Section 77 of the Bankruptcy Act, of the Denver and Rio Grande Western RR. Co. reported in 150 Fed. 2nd, page 28, Advance Sheets, September 3, 1945,

At page 37:

> "The mere fact, however, that cash and current assets are not required to be reflected in the capital structure in the form of capitalized value does not remove them from the picture. They are nevertheless

assets of the corporation which must be taken into account in drawing up a fair and equitable plan of reorganization, and must be distributed in a manner that is fair and equitable to all classes of creditors. The Senior Bondholders were paid in full. They received all the new securities and most of the common stock. Ninety per cent of the General Bondholders' claims were wiped out. They received only a small amount of common stock, ten per cent of their total claims. Adequate operating funds are essential to the operation of a railroad. The Senior Bondholders are entitled to receive in addition to the full amount of their claims, working capital sufficient for proper and efficient operation of the railroad. But anything in excess of what was reasonably necessary for this purpose constituted assets of the insolvent corporation which belonged to the remaining creditors."

"We think it is apparent from the record that there were current assets on hand consisting of cash and securities in excess of what was needed for the efficient operation of the road. As pointed out, the working capital of the debtor had increased from a deficit of $9,727,230 as of December 31, 1935, to a surplus of $12,125,683.50 as of December 31, 1944. While these increased net earnings are due in large part to the war, and may therefore be disregarded in setting up the capitalized structure based upon prospective earnings, we cannot disregard the fact that these huge surpluses actually exist. Their existance is an accomplished fact. * * *"

These are the grounds on which this Court's jurisdiction is invoked to review the judgment of the lower Court.

Statement of Case

The receivership of the Seaboard Air Line Railway Company was instituted December 23, 1940, (314) upon a creditors' bill filed in the District Court for the Eastern District of Virginia. There followed on January 15, 1931,

(36) a suit in Equity by the Trustees of First and Consolidated Mortgage claiming a lien upon all the railroads and property, rights, etc. and earnings and income prior and superior to the claims and liens of the defendants named in the Bill, (294) the Fidelity Trust Company (Baltimore), Trustee under the Adjustment Mortgage Indenture was named one of the defendants. Orders were entered and the cause consolidated with the creditors' suit. (315)

The Trustees under the First Mortgage and the Refunding Mortgage filed their respective bills within two months thereafter. (6) Ancillary proceedings were instituted in the District Court for the Southern District of Florida. The present Receivers, Legh R. Powell, Jr. and Henry W. Anderson were appointed December 31, 1932, upon the resignation of one of the original Receivers and have operated the Seaboard since then.

Not until February 3, 1941, was any further action of foreclosure taken. Then followed a series of actions by seven of the Underlying bonds. December 5, 1942, the last foreclosure was instituted and the same action as to impounding orders (57) and as to Receivers taken. The Trustee under the Adjustment Mortgage Indenture did nothing.

The Seaboard remained in the Equity Court Receivership with nothing done looking to a reorganization until March 4, 1940, when a Special Master appointed by the Courts, commenced hearings for the purpose of formulating a plan of reorganization. (136). The Special Master submitted his report July 20, 1943 (175) with a plan of reorganization in which the Adjustment bonds were denied any value and any right to participate in the assets of the Railroad in reorganization. Exceptions to this Report were filed by certain groups of secured creditors and stockholders and during the hearing on these exceptions in the District Court, on October 29, 1943, Emanuel M.

Cohan with two other bondholders came in and filed exceptions, supposedly on behalf of the Adjustment bonds. (233) The District Court overruled exceptions to the Master's Report and by its order of December 10, 1943, confirmed the Report, as modified. (242)

From the order of December 10, 1943, appeals to the Circuit Court of Appeals for the Fourth Circuit were taken on behalf of different groups of security holders. One of the petitioners herein, Mr. Simpson, pro se, appealed on behalf of the South Bound Railroad Company bonds, an underlying mortgage. The Cohan group, which had appeared in the proceedings as representing Adjustment bonds, entered an appeal, (239) but, by letter dated May 4, 1944, addressed to the Clerk of the District Court, withdrew the appeal. (241) The Circuit Court of Appeals affirmed the lower Court, August 2, 1944, the opinion being reported in 145 Fed. (2d), page 40, under the title, *Badenhausen, et al.* vs. *Guaranty Trust Co., et al.* (*Guaranty Trust Company, et al.* vs. *Seaboard Air Line Railway Company, et al.*)

Chronology of General Mortgages of The Seaboard Air Line Railway Company

First Mortgage 4% bonds, due April 1, 1950, issued under mortgage dated April 14, 1900. A direct first mortgage lien on 243.70 miles of railroad and junior lien on 2174.83. There are various securities and certain equipment covered by the lien. $19,024,320 of this debt is in the hands of public of which $6,256,320 is unpaid interest to January 1, 1943.

Refunding Mortgage 4% bonds, due October 1, 1959, issued under mortgage dated October 1, 1909. A direct first lien on 215.85 miles of railroad, a direct junior lien on all mileage and securities covered by the First Mortgage, a direct junior lien on 192.35 miles of railroad, a junior lien

on 62.77 miles of railroad, and a lien upon various securities. $27,000,000 of First Mortgage 4s are deposited with Refunding Trustee. The Trustee holds various securities and claims against other securities. A lien upon certain equipment. $28,831,000 of this debt is in the hands of the public of which $9,481,500 is unpaid interest to January 1, 1943.

Adjustment Mortgage 5% bonds, due October 1, 1949, issued under mortgage dated October 1, 1909. A lien immediately subordinate to the Refunding Mortgage on all railroad mileage and securities which are subject to the lien of the Refunding Mortgage. All railway and other property thereafter acquired. All profits and other income from the property subject to the lien. $4,708,333 of this debt is in the hands of the public of which $2,208,333 is unpaid interest to January 1, 1943.

First and Consolidated Mortgage 6% bonds, due September 1, 1945, issued under a mortgage and deed of trust dated September 1, 1915, which purports to give a direct first mortgage lien on 408.96 miles of railroad (East Carolina Lines). The Refunding Mortgage Trustee claimed a lien upon this mileage prior to that of Consolidated 6s. There were $65,915,000 of Refunding bonds deposited under this mortgage. A lien of certain equipment and various securities. $107,875,320 is in the hands of the public of which $45,877,820 is unpaid interest to January 1, 1943.

The Seaboard Air Line Rwy Co. came to be the successor in interest by merger and consolidation of S. A. L. Rwy. with the Carolina, Atlantic and Western Rwy. on or about 15 Nov. 1915, (24, 25)

Argument

The argument will follow as to the issuance of the writ and the authority therefore—then, as to the errors in the lower Courts in denying to the Adjustment bondholders any relief.

That the Court, in the exercise of its judicial discretion, may issue the writ of certiorari to review the judgment of the lower Court is established by numerous decisions of this Court and to quote from the Courts opinion in a recent reorganization proceeding under the bankruptcy statute: "We granted the petitions for certiorari because of the importance in the administration of the reorganization provisions of the Act of certain principles enunciated by the Circuit Court of Appeals."

Consolidated Rock Products Co. vs. *DuBois* (supra),

This Court granted the writ in the case of
Ecker vs. *Western Pacific R. Corp.* (supra).

to review questions in connection with railroad reorganization and questions of "priorities of liens created by different mortgages and subsidiary issues".

And in the companion cases arising out of the reorganization of the *Chicago, M., St. Paul & P. R. R. Co.*, (Supra).

In the case at bar, the reorganization of the Seaboard did not come under the provisions of Section 77 of the Bankruptcy Act but continued under the Equity Court consent receivership to be reorganized notwithstanding the passage of that Act in 1933 and its subsequent amendments. This Court said of the equity receiverships: "These were cumbersome, costly and privately managed," in the *Western Pacific R. Corp.* case (supra).

This Court granted the writ of certiorari in: *South Chicago Coal and Dock Co.* vs. *Bassett*, 300 U. S. at page 253; 84 L. Ed. at page 734,

"Because of an alleged conflict with a decision of the Court of Appeals of the Fifth Circuit."

It is respectfully submitted that the writ should issue.

As to the errors in the lower Courts?

The Trustee of the Adjustment Mortgage took no action looking to the protection of the interests of its bondholders. In that situation, there was nothing to do other than what these Petitioners did, that is, file their claims in the Receivership proceedings.

"If the mortgage trustee fails to file claims, holders of bonds secured by a mortgage are entitled to file their claims and, further, a provision of the mortgage giving exclusive right to trustee is ineffectual to the extent it is prejudicial to such right of the bondholders." *Blumgart* vs. *St. Louis, San Francisco Railway,* 94 Fed. (2d), page 712.

The right of the bondholder to act is given under the Act. Title 11, U. S. C. A. 205(c) 7 and 13.

As to laches on the part of the Petitioners?

The Petitioners tried to get the Trustee under the Adjustment Mortgage to take action (18) but only succeeded in having the Trustee give the formal notice of default which accelerated the maturity of the principal and made the interest due and payable to date (19).

This Court said the delay of over ten years on the part of Boyd in trying to establish his unsecured claim was not such laches as to bar his suit.

Northern Pacific Rwy. Co. vs. *Boyd,* (supra).

And this Court has said that "failure, long continued, to discover a well known appropriate remedy for a wrong, does not establish laches where there has been due diligence and the defendant has not been prejudiced by the delay."

Southern Pacific Co. vs. *Bogert,* 250 U. S. 483, 63 L. Ed. 1099.

The Petitioners filed their claims as bondholders and took this action, not only for themselves, but for any and all other holders immediately after they found their efforts, to move the Trustee of their bonds to file, were futile.

Perhaps enough has already been said as to the lien of the Adjustment bonds and the lien, if any of the First and Consolidated 6% bonds, but, it might be added, that the Counsel for the Trustee of the Refunding bonds raised the question as to the lien, if any, of the First and Consolidated 6% bonds and if there had been no *compromise* settlement of this question and the First and Consolidated 6% bonds had been relegated to their proper position in the heirarchy of Seaboard securities the Adjustment bonds would have received full payment before the, so called, First and Consolidated 6% bonds were permitted to participate in the allocation of the securities of the new Seaboard.

This would have been the proper application of the rule of this Court arising out of the *Boyd* case (*Northern Pacific R. R.* vs. *Boyd*).

The District Court, even today, has before it the question of distributing $9,334,000.00 to the holders of old securities of the Seaboard. (The Baltimore Sun, 28 Dec. 1945, page 22.)

It is respectfully submitted the Petitioners are entitled to some relief at the hands of this Court.

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Dated, January 4, 1946.

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No. 715.

H. J. BLACKFORD, *et al.*,
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LEGH R. POWELL, JR., *et al.*,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LEONARD D. ADKINS,
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I. L. TAPPEN,
Counsel for The New York Trust Company as Trustee of Seaboard Air Line Railway Refunding Mortgage.

EDWIN S. S. SUNDERLAND,
Counsel for Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees of Seaboard Air Line Railway Company First and Consolidated Mortgage.

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OCTOBER TERM 1945.

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LEGH R. POWELL, JR., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

The Respondents joining in this brief are Legh R. Powell, Jr., and Henry W. Anderson, Receivers of the properties of Seaboard Air Line Railway Company (hereafter for brevity sometimes referred to as the "Seaboard"), Otis A. Glazebrook, Jr., Joseph France and S. Ralph Warnken, constituting the Reorganization Committee of the Seaboard, The New York Trust Company, as Trustee of Seaboard Air Line Railway Refunding Mortgage, and Guaranty Trust Company of New York and Merrel P. Callaway, as Trustees of Seaboard Air Line Railway Company First and Consolidated Mortgage.

The Petition of Blackford, *et al.*, to review the decision of the Circuit Court of Appeals for the Fourth Circuit handed down October 11, 1945, is, as were the proceedings in the Courts below instituted by the Petitioners, clearly a belated attempt to upset and nullify the Plan of Reorganization of the Seaboard approved by the Decrees of the Seaboard Receivership Courts, affirmed on appeal by the Circuit Courts of Appeals, respectively, for the Fourth and Fifth Circuits and certiorari denied by this Court. *Badenhausen, et al.* v. *Guaranty Trust Company of New York, et al.* 146 Fed. (2d) 40; (cert. den. 323 U. S. 797); *Badenhausen* v. *Glazebrook*, 148 Fed. (2d) 450; (cert. den. October 8, 1945—No. 213). The Adjustment Bonds held by the Petitioners here, which are the subject of the Petition, were dealt with and denied participation in the Seaboard Plan by the District Court for the Eastern District of Virginia in its full opinion stating its reasons for approving the Plan. *Guaranty Trust Company of New York* v. *Seaboard Air Line Railway Company*, 53 Fed. Supp. 672.

The Petition is so wholly lacking in substance that a reply should not be necessary. However, since the Seaboard Reorganization is on the very verge of complete consummation and the granting of the Petition would result in substantial delay in such consummation, counsel feel it incumbent upon them to point out now in some detail the reasons why the Petition should be denied.

The Decree of December 10, 1943 approving the Plan was rendered only after elaborate hearings held in October and November 1943 after full notice to all parties in interest upon the Report of the Special Master appointed to recommend a Plan, who had himself conducted hearings throughout the period January 1940 to July 1943, when the Report was filed.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Fourth Circuit sought to be reviewed by the Petition is not yet reported but appears at pages 337 to 342 of the printed record in this Court filed with the Petition of Blackford, *et als.* The Seaboard Receivership Court (Eastern District of Virginia) in dismissing by its order dated April 27, 1945 (R., p. 46) the intervening petition of Blackford and others, filed no written opinion, but delivered an oral opinion which appears in the Record at pages 126-131.

Jurisdiction.

Petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code (28 U. S. C., Section 247), but the Petition states none of the "special and important reasons" for certiorari given in Section 5 of Rule 38 of this Court. *United States* v. *Johnson,* 268 U. S. 220, 227 (1925).

Statement of the Case.

In affirming the order of the Court below the Circuit Court of Appeals in its opinion declared that the appeal to that Court was completely devoid of merit as shown from the following excerpts from that opinion:

> "It is obvious from the opinion of the District Court* and of this Court heretofore filed in this proceeding that the present appeal is completely devoid of merit. * * *"
>
> "The conclusive answer to the appeal, however, is the patent fact that it is an attempt to set aside

* The opinion of the District Court referred to by the Circuit Court of Appeals is the opinion in *Guaranty Trust Company of New York* v. *Seaboard Air Line Ry. Co.* cited *ante,* p. 2.

the plan of reorganization formulated after years of careful investigation and approved by the District Court and by this court on appeal. No satisfactory excuse or explanation for so extraordinary an effort has been or can be made. Appellant Blackford's bonds were acquired on December 19, 1944, after the decision of this court, and Simpson's bonds were acquired by him partly before and partly after the decree of the District Court on December 10, 1943, and none of the appellants or other holders of the bonds took any action against the plan after that decree until February 9, 1945 when the petition now under consideration was filed. The laches of the appellants has been so gross that they are entitled to no further consideration by the court. Indeed there is much ground in support of the motion of the receivers that the court should impose a penalty upon them for taking an appeal so lacking in justification, as authorized by the statutes, 28 U. S. C. A. Sections 878 and 880, which provide that where a judgment is affirmed by a Circuit Court of Appeals, the court shall adjudge to the appellees just damages for the delay, and single or double costs in its discretion."

The mortgage known as the Adjustment Mortgage, given by Seaboard Air Line Railway, predecessor to the present Seaboard Air Line Railway Company, dated October 1, 1909, to secure the bonds held by the Petitioners, is by its terms expressly subordinate to the lien of the Refunding Mortgage executed by the same company which covered the identical properties covered by the Adjustment Mortgage.

The Fidelity Trust Company, Trustee of the Adjustment Mortgage, obviously recognizing the futility of litigation, never appeared or took any part in the Seaboard Reorganization Proceedings but consistently defaulted in other prior lien mortgage foreclosure proceedings, which

matured in a Consolidated Decree of Foreclosure and Sale entered in April 1945, pursuant to which all property subject to the lien of the Adjustment Mortgage was sold on foreclosure of prior mortgages (R. pp. 294, 295, 323-328). No appeal was taken from the Final Decree of Foreclosure and Sale, or from the Order confirming the sale thereunder. That settled the rights of the Adjustment Bonds and precluded any subsequent efforts to reopen the Reorganization Proceedings. *Shaw* v. *Little Rock and Fort Smith Ry. Co.*, 100 U. S. 605; *Wallace* v. *Loomis*, 97 U. S. 146; *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475.

In approving the Seaboard Reorganization Plan by its Decree dated December 10, 1943, the Virginia District Court filed an elaborate opinion. *Guaranty Trust Company of New York* v. *Seaboard Air Line Railway Company*, 53 Fed. Supp. 672. This opinion at pages 680 and 681 of 53 Fed. Supp. gives fully the reasons for denying the Adjustment Bonds participation in the Plan. As stated on pages 14 and 15 of the Petition, an appeal was taken from this Decree by a group calling themselves "Representatives and Agents of Seaboard Air Line Railway Adjustment 5's '49 Bondholders Group" (see also R., pp. 239-241) but this appeal was withdrawn before it had been matured. This group had previously filed exceptions to the Report of the Special Master (R., p. 157) and counsel for this group were heard by the Court (R., pp. 226-235). None of these Petitioners took any appeal, and, of course, Blackford could not have done so because he did not buy his bonds until a year later.

On February 9, 1945, and therefore more than a year after the Decree of the District Court approving the Plan, these Petitioners filed their Petition, the essential purpose of which was to reopen the Decree of December 10, 1943 approving the Plan and obtain payment out of receivership funds of the Adjustment Bonds. That to do so would have

completely disrupted the Plan is too obvious to call for argument. A subordinate question raised by the Petition was as to the payment of coupons on the Adjustment Bonds that matured prior to the Seaboard Receivership, a question also disposed of by the District Court in its order dismissing the Petition and by the Circuit Court of Appeals. That aspect of the contentions of the Petitioners made in the Courts below is not renewed in the Petition or supporting brief.

Thus it is clear that the effort of the Petitioners here is to reopen and relitigate questions already decided by the previous Decree approving the Plan, from which, as to the Adjustment Bonds, no appeal was ever prosecuted.

Reasons Assigned by Petitioners in Support of their Petition.

Neither the Petition itself nor the brief in support thereof offers any intelligible reason why the previous Decree should not be treated as completely *res adjudicata* of the rights of the Petitioners, and indeed the Petition is merely an attempt to collaterally attack that Decree. All these considerations are so clearly pointed out in the opinion of the Circuit Court of Appeals that further elaboration would seem to be unnecessary.

Argument.

The sole ground suggested by Petitioners for invoking the jurisdiction of this Court is that the allocation of new securities to the First and Consolidated Mortgage Bonds, without allocating any securities to the Adjustment Bonds, was a violation of the principles laid down by this Court in *Northern Pacific Railway Co.* v. *Boyd,* 228 U. S. 422, and *Consolidated Rock Products Co.* v. *Dubois,* 312 U. S. 510.

That contention is based on Petitioners' incorrect assumption that the First and Consolidated Mortgage was junior to the Adjustment Mortgage. That is an incorrect assumption, not supported by anything whatsoever in the record.

The facts are that the Refunding Mortgage is a lien junior to various underlying liens on substantially all lines of railroad owned by the Seaboard. The Adjustment Mortgage is a lien on the same lines of railroad junior to the lien of the Refunding Mortgage. The First and Consolidated Mortgage is not a lien on any of said lines of railroad (except the East Carolina Lines referred to below) but is a first lien on certain valuable securities of subsidiaries of Seaboard and on a substantial amount of equipment. The Consolidated Mortgage is also a lien on $65,915,000 of Refunding Bonds, or 77.31% of all outstanding Refunding Bonds. Any lien of the Refunding Bonds or the Adjustment Bonds on the securities and equipment subject to the First and Consolidated Mortgage is junior to the lien of the First and Consolidated Mortgage thereon.

There was no controversy about the relative liens of the Refunding Mortgage and the First and Consolidated Mortgage except in respect of certain lines of railroad known as the East Carolina Lines. On those lines of railroad both the Refunding Mortgage and the First and Consolidated Mortage claimed a first lien. That controversy was disposed of in the Reorganization Plan on the basis of a compromise whereby a portion of the new securities representing the value of the East Carolina Lines was allocated to the Refunding Mortgage and a portion thereof was allocated to the Consolidated Mortgage. No securities were allocated to the First and Consolidated Mortgage in respect of any property on which the Refunding Mortgage or the

Adjustment Mortgage claimed a prior lien, except the East Carolina Lines.

The maximum face amount of new securities issuable under the Plan in respect of the East Carolina Lines in the Plan was $19,812,000, including approximately 56,000 shares of common stock without par value taken at $100 per share. Of those securities approximately $14,600,000 face amount were allocated to the First and Consolidated Mortgage. It is, therefore, clear that the maximum adverse effect of the settlement of the East Carolina Lines controversy on the Refunding Bonds and the Adjustment Bonds was $14,600,000.

The total claim of the Refunding Mortgage Bonds, including those outstanding in the hands of the public and those pledged under the Consolidated Mortgage, was approximately $159,000,000. The total of new securities allotted to the Refunding Bonds, both those outstanding and those pledged, was approximately $83,000,000 (taking common stock at $100 per share), leaving a deficiency of approximately $76,000,000 in the claim of the Refunding Mortgage which would have to be made good before any securities could be allotted to the Adjustment Mortgage. It is not controverted by these petitioners that the Adjustment Mortgage was in all respects junior to the lien of the Refunding Mortgage.

Since the maximum allotment to the First and Consolidated Mortgage Bonds in respect of the East Carolina Lines was only $14,600,000, it is obvious that the allotment of this additional amount to the Refunding Bonds would have fallen far short of filling out their claim and that even had all those securities been so allotted there would have been nothing available for the Adjustment Bonds.

It is, therefore, clear that there is no substance whatever to the Petitioners' claim that allotments to the First and Consolidated Mortgage were in violation of the principles of the *Boyd* case and they disregard all the facts in the record when they say (Petitioners' Brief, p. 19):

> "If there had been no compromise settlement of this question and the First and Consolidated 6% Bonds had been relegated to their proper position in the hierarchy of Seaboard securities the Adjustment Bonds *would have received full payment* before the so-called First and Consolidated 6% Bonds were permitted to participate in the allocation of the securities of the new Seaboard." (Italics supplied.)

All allotments to the Consolidated Mortgage, except the allotment of approximately $14,600,000 made in respect of the East Carolina Lines, were for property on which the First and Consolidated Mortgage had an unquestioned first lien. The allotment of securities to the Consolidated Mortgage in respect of a portion of the value of the East Carolina Lines, even if not a correct allotment, had no adverse effect on the Adjustment Bonds because the Adjustment Bonds would not have been entitled to any participation under the Plan if the entire value of the East Carolina Lines had been allotted to the Refunding Bonds.

As the Circuit Court of Appeals said (R., p. 341):

> "Nor was there any injury to holders of the Adjustment Bonds by the ratification of the compromise of the controversy which arose between the holders of the Refunding Mortgage Bonds and the holders of First and Consolidated Mortgage Bonds. The tabulations in the Special Master's report clearly show that if the compromise had not been made and litigation had resulted in a decision completely favorable to the holders of the Refunding Bonds, the additional

> payments which they would thereby have received would have still left a deficiency in their claim so that there would have been no excess payable to the holders of the Adjustment Mortgage Bonds."

As pointed out above, the question sought to be raised by this Petition is *res judicata* because of the failure of Petitioners or any other representative of the Adjustment Bonds to appeal from the order approving the Plan or from the Final Decree of Foreclosure and Sale. However, it seemed to us proper to point out to this Court that our opposition to the Petition is not primarily on technical grounds and that Petitioners could not have succeeded in their contention even if it had been timely made.

The two page argument in the brief for Petitioners (pp. 17 and 18) is largely confined to an attempt to excuse the laches of Petitioners on the sole ground that the Trustee of the Adjustment Mortgage took no action in the Seaboard Reorganization Proceedings for the protection of the bonds, but on the contrary, made repeated defaults as a party to the several proceedings for the foreclosure of mortgages prior in right to the Adjustment Mortgage.

The following language from the opinion in *Leadville Coal Co.* v. *McCreery*, 141 U. S. 475, where creditors sought belatedly to upset a railroad reorganization, is a suitable conclusion to this brief:

> "It is insisted that the circuit court erred in refusing to allow a contest of the adjudication of the rights of creditors made in its final decree, on the subsequently filed petition of these appellants; and also that it refused to allow the claim of one of these appellants who now insists that he is a creditor and entitled to share in the proceeds of the sale. In the proceedings anterior to the final decree, it appears that notice was given to all creditors to prove their

claims, and that this particular creditor had notice of those proceedings, but failed to make proof of his right. It is now insisted that the decree in respect to these several claims were merely interlocutory, and that the matter is open to further and subsequent inquiry. There is no pretense of want of notice, or ignorance of the proceedings, and no excuse given for failing to litigate all these matters when before the court prior to the decree. Under such circumstances we dissent entirely from the contention that this decree was, as to these matters, merely an interlocutory order. That decree determined the rights of all parties interested in the proceeds of this property, and if any one of these appellants after notice failed to assert his rights or to challenge the allowances then made by the court, his rights and challenge were lost. He has had his day in court, and is concluded by the final decree."

Respectfully submitted,

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